Supreme Court, U.S.
FILED

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No._____

IN THE

Supreme Court of the United States

October Term, 2000

VIRGINIE GSCHWIND, IN HER OWN RIGHT AND ADMINISTRATRIX OF THE ESTATE OF CYRIL GSCHWIND, DECEASED, AND AS PARENT AND NATURAL GUARDIAN OF ALEXANDRA GSCHWIND,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY, AND PRATT & WHITNEY CANADA INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Virginie Gschwind respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

BURRUPS PACKARD® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-8000

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does 28 U.S.C. § 1332(a)(2) require a citizen of the United States on both sides of an action between foreign citizens?

2. Is the conditional dismissal of an action for *forum non conveniens* in the absence of subject matter jurisdiction a clear usurpation of power for purposes of Fed. R. Civ. P. 60(b)(4)?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Tenth Circuit: Virginie Gschwind (Appellant) and The Cessna Aircraft Company and Pratt & Whitney Canada Inc. (Appellees). The Cessna Aircraft Company is a subsidiary of Textron Inc.. Pratt & Whitney Canada is a subsidiary of United Technologies Corporation.

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The decision of the court of appeals affirming the district court (App. 1a to 9a) is reported at 232 F.3d 1342 (10th Cir. 2000). The memorandum and order of the district court (App. 10a to 19a) is reported at 189 F.R.D. 643 (D. Kan. 1999).

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2000. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The statute and rule involved in this case, 28 U.S.C. § 1332(a) and Fed. R. Civ. P. 60(b)(4), appear in the appendix to this petition. (App. 20a).

STATEMENT OF THE CASE

This wrongful death and survival action arises from the fatal crash of a brand new Cessna Caravan 208B aircraft, which occurred on August 16, 1993 near Cannes, France, killing Cyril Gschwind.

Mr. Gschwind was a French national who lived in Belgium with his pregnant wife, a Belgian citizen, and their infant daughter. His widow commenced a wrongful death action in the Court of Common Pleas of Montgomery County, Ohio on August 11, 1995. Named as defendants were The Cessna Aircraft Company (Cessna), a Kansas corporation with its principal place of business in Kansas, Pratt & Whitney Canada, Inc. (Pratt & Whitney Canada), a Canadian corporation with its principal place of business in Canada, and Hartzell Propeller Inc. (Hartzell), an Ohio corporation with its principal place of business in Ohio, Hartzell being one of two manufacturers, along with the McCauley Division of Cessna, which make propellers for the Caravan.

The defendants removed to the United States District Court for the Southern District of Ohio, asserting subject matter jurisdiction pursuant to 28 U.S.C. § 1332, although they did not specify what subsection of the diversity statute was being invoked. In their removal petition, the defendants alleged that, while Hartzell was an Ohio defendant such that the action would not normally be removable pursuant to 28 U.S.C. § 1441(b), in reality the aircraft propellers were not manufactured by Hartzell but were manufactured by McCauley, an unincorporated division of Cessna, a Kansas corporation.

Gschwind moved to remand, raising a defect in the removal procedure under 28 U.S.C. § 1447(c) by virtue of the presence of a resident defendant. The motion was first granted, then ultimately denied by the magistrate judge after a motion for reconsideration was filed by the defendants. Objections were timely filed. The motion for remand and objections were denied as "moot" by the district court after the resident defendant was dismissed as a party.

The defendants moved to dismiss the action for *forum non conveniens* or, in the alternative, for a transfer to the District of Kansas pursuant to 28 U.S.C. § 1404(a). The magistrate judge issued a report recommending that the case not be dismissed for *forum non conveniens* but granting the alternative request to transfer the case to the District of Kansas. The action was then transferred.

Six months after the transfer, the District of Kansas granted the *forum non conveniens* motions and conditionally dismissed the action in an unreported decision.

Gschwind appealed to the United States Court of Appeals for the Tenth Circuit. The *forum non conveniens* dismissal was affirmed by the Tenth Circuit. *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998).

Gschwind moved for panel rehearing to set aside the judgment on the ground that the court lacked subject matter jurisdiction given that the plaintiff and one of the defendants "were citizens or subjects of a foreign state" so there was no alienage jurisdiction under 28 U.S.C. § 1332(a)(2) and no other independent basis for subject matter jurisdiction. Rehearing and rehearing *en banc* were denied, without comment, on November 10, 1998. A petition for writ of certiorari was denied on May 17, 1999. *Gschwind v. Cessna Aircraft Co.*, 232 U.S. 1341 (1999).

Shortly thereafter, Gschwind filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(4), urging the district court to set aside the judgment for a total want of jurisdiction. Neither defendant disputed the lack of subject matter jurisdiction, though they both opposed the motion.

Pratt & Whitney Canada took the position that subject matter jurisdiction had been conclusively settled. Cessna took the position that Gschwind "unsuccessfully challenged" subject matter jurisdiction on appeal even though it previously told this Court that certiorari should be denied because subject matter jurisdiction was "an issue that was not briefed, argued, or decided below" and "the Tenth Circuit decision does not even address the jurisdictional issue."

The district court denied the 60(b)(4) motion. In finding the judgment to have been erroneous and voidable, rather than void, the district court stated that it "agree[d]. . .that if the court did not have subject matter jurisdiction over the action pursuant to diversity jurisdiction under 28 U.S.C.§1332, its dismissal of plaintiff's case with conditions on grounds of *forum non conveniens* was an erroneous exercise of jurisdiction." *Gschwind v. Cessna Aircraft Co.,* 189 F.R.D. 643 (D. Kan. 1999). However, the court concluded the lack of jurisdiction did not void the judgment:

> Diversity jurisdiction "rests on statutory interpretation, not constitutional command." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, ____, 119 S. Ct. 1563, 1570 (1999). If a federal court exercises jurisdiction on the erroneous assumption of diversity jurisdiction, 28 U.S.C. § 1332 is offended, not the Constitution. *See id.* Thus, assuming this court was without jurisdiction under the diversity statute, its exercise (and the Tenth Circuit's exercise) of jurisdiction was a mere erroneous interpretation of 28 U.S.C. § 1332, not a clear usurpation of constitutionally granted authority.

189 F.R.D. at 647. Chastising Gschwind for "miss[ing] the chance to catch a ride on the appellate court's boat to the land of reversal and remand," the court denied the Rule 60(b)(4) motion to vacate the judgment. *Id.* at 649.

Gschwind again appealed to the Tenth Circuit. In affirming, the court of appeals "assumed for the sake of argument that the requirements of [28 U.S.C.] § 1332 were not met because Ms. Gschwind was not joined by a United States citizen." *Gschwind v. Cessna Aircraft Co.,* 232 F.2d 1342, 1345 (10th Cir. 2000). The court of appeals further acknowledged "the district court could have exercised jurisdiction pursuant only to § 1332(a)(2), if at all." 232 F.3d at 1345. Though noting "the circuits that have considered the issue read § 1332(a)(2) to require United States citizens on both sides of an action between foreign citizens," the court of appeals nevertheless asserted this interpretation [to be] far from clear on the face of § 1332(a)(2)." 232 F.3d at 1345 (citations omitted).

The court of appeals therefore characterized the exercise of jurisdiction to be an "erroneous interpretation" of subject matter jurisdiction and voidable, rather than void for lack of subject matter jurisdiction. 232 F.3d at 1346. In reaching this conclusion, the court of appeals emphasized that "[t]he express language of § 1332(a)(2) does not require a United States citizen on both sides of an action between foreign citizens." *Id.* (citing *Allendale Mutual Ins. Co. v. Bull Data Systems Co.*, 10 F.3d 425, 428) (7th Cir. 1993). The court of appeals concluded that the district court did not impermissibly extend its jurisdiction in ordering the *forum non conveniens* dismissal but "did nothing more than erroneously exercise its jurisdiction in this particular case." 232 F.3d at 1346.

Finally, the court of appeals distinguished *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920), because "the jurisdictional statute in *Vallely* plainly excluded insurance companies from jurisdiction, [while] § 1332 does not on its face exclude actions brought by a foreign citizen against a foreign and United States citizen." 232 F.3d at 1347-48.

REASONS FOR GRANTING THE WRIT

For two centuries, the Court has interpreted diversity jurisdiction to require complete diversity. The Court has also cautioned that a pronouncement on the merits when a court has no jurisdiction to do so an improper extension of jurisdiction and usurpation of jurisdictional power.

Congress did not grant diversity jurisdiction over this entire category of cases, suits between aliens. The Tenth Circuit's decision conflicts with those circuits which have expressly decided the issue whether U.S. citizens are required on both side of a controversy between foreign citizens. Condition forum conveniens dismissals, absent an initial determination of jurisdiction conflict with the Court's teachings and a contrary decision by the District of Columbia Circuit.

This case raises important questions of jurisdiction and the power of federal courts to decline jurisdiction, if it exists, or to determine whether it has jurisdiction in the first instance. The Court should grant review to resolve these questions.

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THOSE CASES HOLDING 28 U.S.C. § 1332(a)(2) REQUIRES COMPLETE DIVERSITY, THAT IS, AN UNITED STATES CITIZEN ON BOTH SIDES OF AN ACTION BETWEEN FOREIGN CITIZENS.

The defendants removed this action "pursuant to 28 U.S.C. § 1332." Section 1332 affords diversity jurisdiction in the following situations only:

1. in suits between "citizens of different States" (28 U.S.C. § 1332(a)(1)); *or*

2. in suits between "citizens of a State and citizens or subjects of a foreign state" (28 U.S.C. § 1332 (a)(2)); *or*

3. in suits between "citizens of different states and in which citizens or subjects of a foreign state are additional parties" (28 U.S.C. § 1332(a)(3)); *or*

4. in suits between a "foreign state, defined in [28 U.S.C. § 1602(a)], as plaintiff and a citizen of a State or of different States" (28 U.S.C. § 1332(a)(4)).

The only possible basis of diversity jurisdiction is 28 U.S.C. § 1332(a)(2), affording jurisdiction in cases between "citizens of a State and citizens or subjects of a foreign state," which the Tenth Circuit noted in its opinion. 232 F.3d at 1345. "Section 1332 has been interpreted to require 'complete diversity.'" *Ruhrgas v. Marathon Oil Co.,* 526 U.S. 574, 580 n.2 (1999) (citing *Strawbridge v. Curtiss,* 7 U.S. 267 (1806)). *See also* 526 U.S. at 580 n.2 ("The foreign citizenship of defendant Ruhrgas, a German Ruhrgas, a German corporation, and plaintiff Norge, a Norwegian corporation, rendered diversity incomplete").

While the Court has not had occasion to specifically address the parameters of 28 U.S.C. § 1332(a)(2), it has long recognized that the federal courts have no diversity jurisdiction over suits between aliens, although there may be other

jurisdictional bases. *E.g., Montalet v. Murray,* 4 Cranch (8 U.S.) 46, 47 (1807); *Mossman v. Higginson,* 4 Dall. (4 U.S.) 12, 13 (1800). The Court likewise has described 28 U.S.C. § 1332(a)(2) as "diversity jurisdiction. . .arising from the alienage of one of the parties." *Kramer v. Caribbean Mills, Inc.,* 394 U.S. 823, 829 (1969) (emphasis supplied).

The circuits which have squarely addressed the question have held that alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2) may not be invoked in a suit such as this one because the presence of an alien on both sides of the action destroys complete diversity: "Diversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants." *Mutuelles Unies v. Kroll & Linstrom,* 957 F.2d 707, 711 (9th Cir. 1992) (quoting *Cheng v. Boeing Co.,* 708 F.2d 1406, 1412 (9th Cir.), *cert. denied,* 464 U.S. 1017 (1983)).

The Second, Fifth, Ninth, and District of Columbia Circuits have all held that the presence of foreign citizen on both sides of an action defeats complete diversity. *See, e.g., Franceskin v. Credit Suisse,* 214 F.3d 253, 258 (2d Cir. 2000) (no diversity where citizen of Argentina sued British bank and Swiss bank with New York offices); *Faysound Ltd. v. United Coconut Chemicals, Inc.,* 878 F.2d 290, 295 (9th Cir. 1989) (presence of Swiss defendant, along with New York defendant, in action by Hong Kong plaintiff defeated jurisdiction because diversity was not complete); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.,* 874 F.2d 283, 290-91 (5th Cir. 1989) (no diversity jurisdiction existed to entertain action by West German corporation against Texas corporation and Cayman Islands corporation); *Eze v. Yellow Cab Co. of Alexandria, Virginia, Inc.,* 782 F.2d 1064, 1065 (D.C. Cir. 1986) (citizens of Nigeria could not maintain diversity action against citizen of Ghana and Virginia cab company because diversity was not complete); *Ed & Fred, Inc. v. Puritan Marine Insurance Corp.,* 506 F.2d 757, 758 (5th Cir. 1975) (complete diversity absent in action by citizen of Netherlands Antilles against two defendants, one a citizen of Massachusetts, the other a citizen of Bermuda). *Cf. Corporacion Venezolana de Fomento v. Vintero Sales Corp.,* 629 F.2d 786, 790 (2d Cir. 1980) (no diversity where Venezuelan gov-

ernmental entity sued Swiss corporation and New York corporation), *cert. denied,* 449 U.S. 1080 (1981).

The contrary position is that suggested by the Seventh Circuit in *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.,* 10 F.3d 425, 428 (7th Cir. 1993), which questions the "sense" of the line of cases holding that § 1332(a)(2) "does not permit a suit between foreigners and a mixture of citizens and foreigners." The court of appeals here found *Allendale* persuasive and perceived the supposed lack of clarity in the statute to mean the judgment was voidable rather than void, seizing upon the lack of an express exclusion in the statute requiring complete diversity in suits between aliens to be determinative. 232 F.3d at 1345, 1346.

Subject matter jurisdiction is to be strictly, not expansively, construed. The court here "assumed for sake of argument" that there was no subject matter jurisdiction. The Court has instructed that a federal court may not hypothesize subject matter jurisdiction on the merits, *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 93-94 (1998), nor may it hypothesize jurisdiction for purposes of determining whether the exercise of jurisdiction was void or voidable.

II. IMPOSITION OF CONDITIONS UPON A *FORUM NON CONVENIENS* DISMISSAL ABSENT SUBJECT MATTER JURISDICTION IMPERMISSIBLY EXTENDS JURISDICTION AND VOIDS ANY JUDGMENT ENTERED THEREON.

"[T]he first and fundamental question is that of jurisdiction, first of this [C]ourt, and then of the court from which the record comes." *Mansfield C. & L. M. Ry. Co. v. Swan,* 111 U.S. 379, 382 (1884). "[J]urisdiction is power to declare the law." *Ex Parte McCardle,* 79 U.S. 506, 510 (1869).

A court can determine the merits of a controversy only if jurisdiction exists at all stages of the proceeding. *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975). There was no independent basis for subject matter jurisdiction at the time of removal in

1995 and there remains none to this day. There was no "error" in the determination of a quasi-jurisdictional fact; there was never jurisdiction.

Even if, standing alone, the lack of U.S. citizens on both sides of the controversy was not sufficient to make the judgment void pursuant to Rule 60(b)(4), the question remains whether the district court usurped its jurisdictional authority by imposing conditions upon the *forum non conveniens* dismissal when it didn't have jurisdiction over the action. The court of appeals held it did not. 232 F.3d at 1346.

This holding directly conflicts with *In re Papandreou,* 139 F.3d 247 (D.C. Cir. 1998), *cited with approval* in *Ruhrgas, supra,* 526 U.S. at 584-85. In *Papandreou*, the District of Columbia Circuit recognized that the federal courts have the power to dismiss on issues other than those related to the merits, including *forum non conveniens*, without first reaching jurisdictional questions, and in doing so make "no assumption of law declaring power that violates the separation of powers principles" underlying the Court's decisions in *Mansfield* and *Steel Co.* 139 F.3d at 255. However, the court also cautioned:

> Any such forum non conveniens dismissal could not, however, be subject to conditions, *e.g.,* a condition that defendants promise to submit to the jurisdiction of another court, for exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction.

Id. at 256 n.6. The district court exacted such conditions here, *ultra vires* its authority.

"The doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 504 (1947). The Tenth Circuit not only has held *forum non conveniens* may apply in the absence of jurisdiction but it has authorized an unauthorized exercise of jurisdiction. The Court's intervention is warranted.

CONCLUSION

For the reasons set forth above, petitioner urges that the petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: February 27, 2001

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VIRGINIE GSCHWIND, in her own right and administratrix of the estate of Cyril Gschwind and Alexandra Gschwind,	:	
Plaintiff - Appellant,	:	No. 99-3329
vs.	:	
CESSNA AIRCRAFT COMPANY; PRATT & WHITNEY CANADA, INC.,	:	
Defendants - Appellees.	:	

Appeal from the United States
District Court
For the District of Kansas
(D.C. No. 96-CV-1269-MLB)

Catherine B. Slavin, Wolk & Genter, Philadelphia, Pennsylvania, for Plaintiff Appellant.

John C. Nettels, Jr. (and Thomas E. Nanney, Morrison & Hecker, L.L.P., Kansas City, Missouri, with him on the briefs), Morrison & Hecker, L.L.P., Wichita, Kansas, for Defendant - Appellee Cessna Aircraft Company.

John W. Cowden, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, Missouri, for Defendant—Appellee Pratt & Whitney Canada, Inc.

Before KELLY, ANDERSON, and HENRY, *Circuit Judges.*
KELLY, *Circuit Judge.*

Plaintiff-Appellant Virginie Gschwind appeals from the district court's denial of her Fed. R. Civ. P. 60(b)(4) motion for relief from a judgment dismissing an earlier action on forum non conveniens grounds. Our jurisdiction arises under 28 U.S.C. § 1291, and we AFFIRM.

Background

Ms. Gschwind, a citizen of Belgium, brought a wrongful death and survival action in Ohio state court against The Cessna Aircraft Company ("Cessna"), a Kansas citizen, Pratt & Whitney, a Canadian citizen, and Hartzell Propeller, Inc. ("Hartzell"), an Ohio citizen.[1] The action was then removed to the Southern District of Ohio over Ms. Gschwind's objection. She sought remand, arguing that 28 U.S.C. § 1441(b) prohibited removal because Hartzell was an Ohio citizen. In initially ordering remand to state court on this basis, the district court concluded that "[s]ince Plaintiff is a foreign national, a resident of Belgium, there is complete diversity of citizenship among the parties and the federal courts would have subject matter jurisdiction originally." Aplt. App. at 128. Upon reconsideration, the district court determined that Hartzell was fraudulently joined and denied Ms. Gschwind's motion to remand, implicitly relying upon diversity jurisdiction. After removal, the action was transferred to the District of Kansas where Hartzell was dismissed as a party and the district court conditionally granted a forum non conveniens dismissal. *Id.* at 55-85.

On appeal, we affirmed the forum non conveniens dismissal. Ms. Gschwind then petitioned for rehearing and rehearing en banc, arguing for the first time that the district court lacked diversity jurisdiction over suits between aliens. *Id.* at 173-77, 328-29. We denied the petition. *Id.* at 201-02. She then filed a petition for a writ of certiorari with the Supreme Court, again arguing lack of subject matter jurisdiction. *Id.* at 203-25. The petition was denied.

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1. Cessna and Pratt & Whitney are the Defendant-Appellees as Hartzell was dismissed as a party by the District Court of Kansas.

Ms. Gschwind next returned to federal district court and filed a Rule 60(b)(4) motion for relief from judgment, arguing that the district court's order was void for lack of subject matter jurisdiction. *Gschwind v. Cessna Aircraft Co.*, 189 F.R.D. 643 (D. Kan. 1999). The district court disagreed, concluding that while it may have erroneously assumed jurisdiction, it did not usurp its authority in interpreting the jurisdiction statute. *Id.* at 649. Accordingly, the district court concluded that the judgment may have been erroneous, but was not void. *Id.* The district court therefore concluded that the judgment could not be attacked by a Rule 60(b)(4) motion because the case was no longer pending, as required by Tenth Circuit precedent. *Id.*

The court reviewed three cases–*Wilmer v. Board of County Commissioners of Leavenworth County*, 69 F.3d 406, 409-10 (10th Cir. 1995), *Depex Reina 9 Partnership v. Texas Int'l Petroleum Corp.*, 897 F.2d 461, 464 (10th Cir. 1990), and *Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982)—in which the Tenth Circuit allowed subject matter jurisdiction to be attacked after appeal. In distinguishing those cases, the court noted that the "appellate court had *remanded* the case to the district court and *then* the district court considered subject matter jurisdiction pursuant to a Rule 60(b)(4) motion." *Id.* at 648 (emphasis in original). By way of contrast, in this case "the Tenth Circuit *affirmed* this court's dismissal of the case. The Tenth Circuit *denied* plaintiff's motion for rehearing. The United States Supreme Court *denied* plaintiff's petition for writ of certiorari. Unlike the cases mentioned above, the case was never remanded to the district court and at this point the case is no longer pending." *Id.* (emphasis in original).

The court found an unreported district court decision to be persuasive. *See SBKC Service Corp. v. I I I I Prospect Partners, L.P.*, No. 95-2540-JWL, 1998 WL 928408 (D. Kan. Oct. 30, 1998). In *SBKC*, the plaintiff, like Ms. Gschwind, moved to void the district court's judgment for lack of diversity jurisdiction after exhausting its appellate remedies. *Id.* at *1. The

district court denied the motion, concluding that the plaintiff's failure to contest jurisdiction on direct appeal was fatal. *Id.* at *4.

The district court also concluded that its exercise of jurisdiction was not a usurpation of authority, presumably because the defendant's residence was subject to bona fide dispute.

The district court in this action then concluded: "It follows that a Rule 60(b)(4) motion . . . cannot be used by plaintiff who did not succeed on her argument concerning subject matter jurisdiction during the appellate process. *Gschwind* 189 F.R.D. at 649.

Discussion

We review the district court's denial of Ms. Gschwind's Rule 60(b)(4) motion de novo. *Wilmer,* 69 F.3d at 409; *King Fisher Marine Service, Inc. v. 21st Phoenix Corp.,* 893 F.2d 1155, 1158 (10th Cir. 1990). A district court has

> original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a). On its face, § 1332(a) does not vest the district court with jurisdiction over actions between parties only of foreign citizenship. § 1332(a)(3) does, however, permit foreign citizens to be a party to an action between citizens of different states. § 1332(a)(3) could not have been a basis for jurisdiction in this action, however, because the action was not between citizens of different states. Ms. Gschwind, a foreign citizen, was the lone plaintiff. Therefore, the district court could have exercised jurisdiction pursuant only to § 1332(a)(2), if at all. While the circuits that have considered the issue read § 1332(a)(2) to require United States citizens on

both sides of an action between foreign citizens, *Franceskin v. Credit Suisse,* 214 F.3d 253, 258 (2d Cir. 2000); *Faysound Ltd. v. United Coconut Chemicals. Inc.,* 878 F.2d 290, 295 (9th Cir. 1989); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.,* 874 F.2d 283, 290-91 (5th Cir. 1989); *Eze v. Yellow Cab Co. of Alexandria Virginia , Inc ,* 782 F.2d 1064, 1065 (D.C. Cir. 1986), *Ed & Fred, lnc. v. Puritan Marine Ins. Underwriters Corp.,* 506 F.2d 757, 758 (5th Cir. 1975); MOORE'S FEDERAL PRACTICE § 102.77, at 143-44 (3d ed. 1997), we concur with Judge Posner's observation that this interpretation is far from apparent from the face of 28 U.S.C. § 1332(a)(2). *See Allendale Mutual Ins. Co. v. Bull Data Sys.. Inc.,* 10 F.3d 425, 428 (7th Cir. 1993) ("Exactly what sense all this makes rather eludes us."). Nevertheless, the Defendants assume for the sake of argument that the requirements of § 1332(a)(2) were not satisfied because Ms. Gschwind was not joined by a United States citizen. Aplee. Br. (Pratt & Whitney) at 5; Aplee. Br. (Cessna) at 21. We make this same assumption inasmuch as the district court's views on jurisdiction are not dispositive to our analysis.

Rule 60(b) provides in part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from final judgment, order, or proceeding for the following reasons: . . .(4) the judgment is void." Fed. R. Civ. P. 60(b)(4) (2000). "Rule 60(b)(4). . .is not subject to any time limitation." *Orner v. Shalala,* 30 F.3d 1307, 1310 (10th Cir. 1994) (internal quotations and citations omitted).

A judgment is void for Rule 60(b)(4) purposes if the "rendering court was powerless to enter it." *V.T.A., Inc. v. Arco, Inc.,* 597 F.2d 220, 224 (10th Cir. 1979). A judgment may in some instances be void for lack of subject matter jurisdiction. *E.g. . id.; In re Four Seasons Securities Laws Litigation,* 502 F.2d 834, 842 (10th Cir. 1974). "However, this occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.* 624 F.2d 822, 825 (8th Cir. 1980) (citations omitted); *accord Nemaizer v. Baker* 793 F.2d 58, 65 (2d Cir. 1986) (observing that collateral attack is permitted under Rule

60(b)(4) where there is "a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction") (citations omitted).

A court does not usurp its power when it erroneously exercises jurisdiction. *Kansas City Southern,* 624 F.2d at 825. "Since federal courts have 'jurisdiction to determine jurisdiction,' that is, 'power to interpret the language of the jurisdictional instrument and its application to an issue by the court,' error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction." *Id.* (quoting *Stoll v. Gottlieb,* 305 U.S. 165, 171 (1938)); *see also Lubben v. Selective Serv. Sys. Local Board No. 27.,* 453 F.2d 645, 649 1st Cir. 1972) ("While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction.") (footnote omitted). There must be "no arguable basis on which [the court] could have rested a finding that it had jurisdiction." *Nemaizer,* 793 F.2d at 65.

Applying these principles, we hold that the district court's judgment was not void for lack of subject matter jurisdiction. The Ohio federal district court concluded that "[s]ince Plaintiff is a foreign national, a resident of Belgium, there is complete diversity of citizenship among the parties and the federal courts would have subject matter jurisdiction originally." Aplt. App. at 128. In doing so, the district court erroneously interpreted § 1332(a). However, an erroneous interpretation of a jurisdictional statute does not render the underlying judgment void. *Stoll,* 305 U.S. at 171-72; *Kansas City Southern,* 624 F.2d at 825. Moreover, there was at least an arguable basis for jurisdiction, *cf. Nemaizer,* 793 F.2d at 65, because the scope of the district court's jurisdiction over a case with foreign parties on both sides of an action is far from clear from the face of the statute. The express language of § 1332(a)(2) does not require a United States citizen on both sides of an action between foreign citizens. The requirement only begins to become vaguely apparent when (a)(2) is read together with (a)(3) and even then it is not absolutely clear. *Allendale* 10 F.3d at 428.

Ms. Gschwind argues that the district court mischaracterized its exercise of jurisdiction as quasi-jurisdictional, i.e., that jurisdiction was premised upon the finding of jurisdictional facts. Ms. Gschwind argues that the district court instead exercised jurisdiction upon a general finding of jurisdiction over cases between a foreign citizen and a foreign and United States citizen and that this exercise of jurisdiction rendered the underlying judgment void. Aplt. Brief at 16. Ms. Gschwind correctly observes that the district court's jurisdiction was not based upon quasi-jurisdictional facts. The citizenship of the parties was not in dispute. But this is not dispositive. As we explained, an "error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction." *Kansas City Southern,* 624 F.2d at 825.

Ms. Gschwind also asserts that the district court impermissibly extended its jurisdiction in ordering the forum non conveniens dismissal. Aplt. Br. at 17. Ms. Gschwind relies upon a distinction drawn in MOORE'S FEDERAL PRACTICE between the exercise of jurisdiction over an entire category of cases over which the court does not have jurisdiction (e.g., cases on interlocutory appeal) and the erroneous exercise of jurisdiction over a particular case that falls within a category of cases over which a court generally does have jurisdiction (e.g., diversity cases). *Id.* (quoting MOORE'S FEDERAL PRACTICE 3D § 60.44[2][a-b] (3d 1997) ("[A] lack of subject matter jurisdiction means a court's lack of jurisdiction over an entire category of cases, not whether the court makes a proper or improper determination of subject-matter jurisdiction in a particular case."). Ms. Gschwind argues that the district court in this case exercised jurisdiction over an entire category of cases over which it lacked jurisdiction: cases brought by a foreign citizen against a foreign citizen and a United States citizen. Aplt. Br. at 16; Aplt. Reply Br. at 3.

Assuming this approach is appropriate in distinguishing void, as opposed to voidable, judgments, we disagree with Ms. Gschwind's characterization of the district court's decision. The district court did not exercise jurisdiction over an entire category of cases over which it lacked jurisdiction. The district

court had jurisdiction over cases between diverse parties and assumed that the parties before it satisfied the requirements of 28 U.S.C. § 1332. It did nothing more than erroneously exercise its diversity jurisdiction in this particular case.

Finally, Ms. Gschwind asserts that the Supreme Court's decision in *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920), requires the conclusion that the district court's judgment was void. Aplt. Reply Br. at 5. In *Vallely,* the district court entertained involuntary bankruptcy proceedings against an insurance company. At the time, the Bankruptcy Act expressly provided that insurance companies were not subject to the district court's bankruptcy jurisdiction. *Vallely,* 254 U.S. at 351-52. The district court entered judgment and the time for appeal lapsed, at which time the insurance company contested jurisdiction by filing a motion to vacate the judgment. *Id.* at 351. The Court held that "[c]ourts are constituted by authority and they cannot [act] beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities." *Id.* at 353. The Court distinguished the case from those in which the exercise of jurisdiction was held to be merely erroneous. "[In those cases] the courts had jurisdiction of their subject-matter and necessarily power to pass upon the fact (diversity of citizenship) upon which that jurisdiction depended in the given case. The subject-matter of the suit was not withheld from them by explicit provision of the law which was their sole warrant of power." *Id.* at 354. Because the jurisdictional statute in question clearly excluded insurance companies from jurisdiction, the Court concluded that there was "no power in the District Court to include them . . . For a court to extend the act to corporations of either kind is to enact a law, not to execute one." *Id.* at 355-56.

Vallely is distinguishable. While the jurisdictional statute in *Vallely* plainly excluded insurance companies from jurisdiction, § 1332 does not on its face exclude actions brought by a foreign citizen against a foreign and United States citizen. Thus, unlike the district court's actions in *Vallely,* the district

court's exercise of jurisdiction in this instance does not amount to a total usurpation or extension of jurisdiction.

In light of our holding that the district court's judgment was not void, we need not address whether Ms. Gschwind was barred from attacking subject matter jurisdiction on principles of res judicata.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VIRGINIE GSCHWIND, *Plaintiff,*	:	CIVIL ACTION
v.	:	No. 96-1269-MLB
CESSNA AIRCRAFT COMPANY, et al., *Defendants*	:	

MEMORANDUM AND ORDER

This matter comes before the court on plaintiff Virginie Gschwind's motion to vacate judgment pursuant to Fed. R. Civ. P. 60(b)(4) (Doc. 140). For the reasons set forth below, plaintiff's motion is denied.

I. HISTORY OF THIS CASE

On August 11, 1995, plaintiff, a citizen of Belgium, filed a wrongful death action in the Court of Common Pleas in Montgomery County, Ohio, against defendants, claiming damages for the death of her husband, Cyril Gschwind. Cyril Gschwind, a French national residing in Belgium at the time of his death, was killed in a Cessna aircraft near Cannes, France. The named defendants included Cessna Aircraft Company, a Kansas Corporation with its principal place of business in Kansas, Pratt & Whitney Canada, a Canadian corporation with its principal place of business in Canada, and Hartzell Propeller, Inc., an Ohio corporation with its principal place of business in Ohio.

Subsequently, Cessna removed the action to the United States District Court for the Southern District of Ohio asserting diversity jurisdiction under 28 U.S.C. § 1332. Cessna then moved to dismiss the complaint on the grounds of *forum non conveniens* or, in the alternative, a transfer to the District of Kansas (Doc. 7). Gschwind moved the district court to remand

(Doc. 9). Gschwind, however, did not argue that the district court lacked diversity jurisdiction under 28 U.S.C § 1332. Instead, she conceded in her memorandum in support of her motion that "there is complete diversity of citizenship." (Doc. 145, Ex. A at 2). Although initially the motion was granted, the district court ultimately denied plaintiff's motion (Doc. 35). The district court then granted Cessna's motion to transfer venue and the action was transferred to this court (Doc. 81).

On March 20, 1997, this court conditionally dismissed plaintiff's action on the grounds of *forum non conveniens* (Doc. 125). After defendants filed affidavits agreeing to the court-ordered conditions, the court entered an order of dismissal (Doc. 130). Final judgment was entered on May 8, 1997 (Doc. 131).

Plaintiff appealed to the United States Court of Appeals for the Tenth Circuit arguing against the dismissal of her action for *forum non conveniens.* The Tenth Circuit affirmed. *See Gschwind v. Cessna Aircraft Co.,* 161 F.3d 602, 610 (10th Cir. 1998), *cert. denied,* ____ *U.S.* ____, 119 S. Ct. 1755 (1999).

Subsequently, plaintiff filed a motion for rehearing or rehearing en banc and for the first time argued that this court had no diversity jurisdiction over the action.[1] On November 10, 1998, the Tenth Circuit issued, without opinion, an order denying plaintiff's motion. Plaintiff filed a petition for writ of certiorari to the United States Supreme Court. In her petition, plaintiff once again claimed this court lacked subject matter jurisdiction under the diversity statute. The United States

1. Plaintiff argued that complete diversity did not exist because a " 'citizen[] or subject of a foreign state' (Gschwind) has sued a 'citizen[] of a State" (Cessna) and a "citizen[] or subject of a foreign state "(Pratt & Whitney Canada)[.] . . . [T]he presence of an alien on both sides of the action destroys diversity." *Plaintiff's Petition for Rehearing and Suggestion for Rehearing in Banc* at 2 (citing *Faysound Ltd. v. United Coconut Chemicals Inc.,* 878 F.2d 290, 295 (9th Cir. 1989) in which the court found no diversity jurisdiction in an action involving a Hong Kong plaintiff against a Swiss defendant and a New York defendant). Defendants do not, in their replies to plaintiff's motion, contest plaintiff's proposition that this court lacked subject matter jurisdiction.

Supreme Court denied the petition. *See Gschwind v. Cessna Aircraft Co.*, ____ *U.S.* ____, 119 S. Ct. 1755 (1999).

Now, plaintiff has returned to this court and filed a motion to vacate the court's previous order pursuant to Fed. R. Civ. P. 60(b)(4) (Doc. 140). Plaintiff argues that because this court never had diversity jurisdiction over the action, it was without power to dismiss the action. This court's judgment, the plaintiff continues, is therefore void and must be vacated. As will be explained below, however, once the United States Supreme Court denied plaintiff's writ of certiorari, the issue of subject matter jurisdiction became res judicata and cannot be collaterally attacked.

II. RULE 60(b)(4)

Rule 60(b) of the Federal Rules of Civil Procedure provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . ." Fed. R. Civ. P. Rule 60(b)(4). Voidness is usually found for lack of either subject matter jurisdiction or personal jurisdiction. *See V. T. A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979). A mere erroneous judgment will not be found to be void and it must be determined that the rendering court was powerless to enter the judgment, plainly usurped its power, or acted in a manner inconsistent with due process of law. *See id* at 224-25. Although a motion for relief under 60(b)(4) is subject to a "reasonable" time limitation, if the judgment is found to be void, any 60(b)(4) motion will be considered filed within a reasonable time. *See id.* at 224 & n.9. The Tenth Circuit has stated that "[i]n the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted." *Id.* at 225.

Indeed, it is this conflict between the need for finality of the judgment and the need for validity of the judgment which is at the heart of a Rule 60(b)(4) motion. The comments to the Restatement discuss the conflict:

The problem poses a sharp conflict of basic policies. The principle of finality has its strongest justification where the

parties have had full opportunity to litigate a controversy, especially if they have actually contested both the tribunal's jurisdiction and issues concerning the merits. Yet the principle of finality rests on the premise that the proceeding had the sanction of law, expressed in the rules of subject matter jurisdiction. As long as the possibility exists of making error in a determination of the question of subject matter jurisdiction, the principles of finality and validity cannot be perfectly accommodated. Questions of subject matter jurisdiction must be justiciable if the legal rules governing competency are to be given effect; some tribunal must determine them, either the court in which the action is commenced or some other court of referral. If the question is decided erroneously, and a judgment is allowed to stand in the face of the fact that the court lacked subject matter jurisdiction, then the principle of validity is compromised. On the other hand, if the judgment remains indefinitely subject to attack for a defect of jurisdiction, then the principle of finality is compromised.

Restatement (Second) of Judgments § 12 cmt. a (1982) . The modern approach is to give the finality of final judgments greater weight. *See id.*

III. VALID VERSUS ERRONEOUS JUDGMENTS

The court agrees with plaintiff that if the court did not have subject matter jurisdiction over the action pursuant to diversity jurisdiction under 28 U.S.C. § 1332, then its dismissal of the plaintiff's case with conditions on grounds of *forum non conveniens* was an erroneous exercise of jurisdiction. *See Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 504 (1947) ("Indeed the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue."); *In re Papandreou,* 139 F.3d 247, 255-56 & n.6 (D.C. Cir. 1998) (specifically excepting conditional *forum non conveniens* dismissals from dismissals on other non-merits grounds which are allowed in the absence of the rendering court's subject matter jurisdiction). An erroneous judgment, however, does not render it a nullity, justifying plaintiff's collateral attack.

The United States Supreme Court has examined the meaning of void judgments. *See Chicot County Draniage District v. Baxter State Bank,* 308 U.S. 371 (1940). In *Chicot,* jurisdiction was based on a statute which was subsequently determined to be unconstitutional in an unrelated case. *See id.* at 373-74. The defendant in the original case argued that the subsequent finding that the statute was unconstitutional operated to void the judgment of the district court. *See id.* at 376. The Court disagreed:

> The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.

Id. The Court continued by citing an earlier Supreme Court opinion in which the petitioner alleged an earlier judgment was void because the federal district court opinion failed to prove diversity. *See id* (citing *McCormick v. Sullivant,* 23 U.S. 192 (1825)). The Court quoted the *McCormick* opinion as stating that ' "[i]f the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities." ' *Chicot County,* 308 U.S. at 376 (quoting *McCormick* 23 U.S. at 199).

The First Circuit has had opportunity to further clarify the distinction between erroneous judgments (which may be attacked only under direct review) and void judgment (which

may be attack collaterally as well) . *See Lubben v. Selective Service System Local Bd. No. 27,* 453 F.2d 645 (1st Cir. 1972). The court explained:

> A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect. In the interests of finality, the concept of void judgments is narrowly construed. While absence of subject matter jurisdiction may make a judgment void, such total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. A court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment void. Only in the rare instance of a clear usurpation of power will a judgment be rendered void.

See id. at 649 (footnotes omitted). Because this court's exercise of jurisdiction over the plaintiff's action was not a clear usurpation of power, a collateral attack against the judgment will not stand.

The Tenth Circuit has stated that " 'diversity of citizenship is but a quasi-jurisdictional fact. A judgment based upon an erroneous finding of diversity is not void and is immune from collateral attack.' " *Depex Reina 9 Partnership v. Texas International Petroleum Corp.,* 897 F.2d 461, 463-64 (10th Cir. 1990) (quoting *Green v. Hale,* 433 F.2d 324, 330 n.14 (5th Cir. 1970) (citation omitted)). Diversity jurisdiction "rests on statutory interpretation, not constitutional command." *Ruhrgas AG v. Marathon Oil Co,* ____ U.S. ____, ____, 119 S. Ct. 1563, 1570 (1999). If a federal court exercises jurisdiction on the erroneous assumption of diversity jurisdiction, 28 U.S.C. § 1332 is offended, not the Constitution. *See id.* Thus, assuming this court was without jurisdiction under the diversity statute, its exercise (and the Tenth Circuit's exercise) of jurisdiction was a mere erroneous interpretation of 28 U.S.C. § 1332, not a clear usurpation of constitutionally granted authority. The erroneous implicit findings of this court and the Tenth Circuit were therefore only open to direct attacks, not the

collateral attacks, such as the one the plaintiff is attempting in her Rule 60(b)(4) motion. *Cf. Depex Reina,* 897 F.2d at 463-64 (allowing direct attack on erroneous judgment based on incomplete diversity). *See also Nemaizer v. Baker,* 793 F.2d 58, 65 (2nd Cir. 1986) ("Contrary case law and commentators' views permitting any collateral attack on a prior judgment under Rule 60(b)(4) always involve a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction.") (citations omitted).

IV. DIRECT VERSUS COLLATERAL ATTACKS

Because plaintiff proceeded through the complete appellate process, including a denial of her writ of certiorari from the United States Supreme Court, this court's judgment dismissing her case for *forum non conveniens* became final, in the fullest sense of the word, and plaintiff's subsequent motion is an impermissible collateral attack on the judgment. Plaintiff, in her memorandum in support of her motion, and defendants, in their reply memoranda, spend much time debating the procedural posture of Tenth Circuit precedent concerning Rule 60 (b) (4) motions. Admittedly, the Tenth Circuit (and other circuit courts of appeal) opinions cited by the parties lack a bright line test and use interchangeably the terms "final judgment" and "final decision," blurring the line even further. What can be gleaned from these opinions, however, is that for an attack to be one considered "direct," the action in which the judgment at issue was rendered must still be *pending. See Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation,* 673 F.2d 315, 318 (10th Cir. 1982) (citing 1 *Moore's Federal Practice* ¶ 0.60[4] (2nd ed. 1981) ("So long as a case is pending, the issue of federal court jurisdiction may be raised at any stage of the proceedings either by the parties or by the court on its own motion.") As will be explained below, this court's finding that plaintiff's motion is a collateral attack and Judge Lungstrum's opinion in *SBKS Service Corporation v. 1111 Prospect Partners, L.P.,* No. 95-2540-JWL, 1998 WL 928408, at *4 (D. Kan., Oct. 30, 1998) are fully aligned with the Tenth Circuit's previous opinions.

In *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818 (10th Cir. 1981), the Tenth Circuit stated that "the jurisdiction of a court over subject matter may be raised at any point in the proceeding." *Id.* at 822 (citations omitted). Following this statement of the law, to the Tenth Circuit has three times allowed subject matter jurisdiction to be questioned following appeal. *See Wilmer v. Board of County Commissioners*, 69 F.3d 406, 409-10 (10th Cir. 1995); *Depex Reina 9 Partnership v. Texas International Petroleum Corporation*, 897 F.2d 461, 464 (10th Cir. 1990); *Ramey Construction Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). What distinguishes the Procedural posture of *Wilmer, Depex Reina* and *Ramey* from the instant action is that in those three cases the appellate court had *remanded* the case to the district court and *then* the district court considered subject matter jurisdiction pursuant to a Rule 60(b)(4) motion.[2]

By contrast, in the instant action, the Tenth Circuit *affirmed* this court's dismissal of the case. The Tenth Circuit *denied* plaintiff's motion for rehearing. The United States Supreme Court *denied* plaintiff's petition for writ of certiorari. Unlike the cases mentioned above, the case was never remanded to the district court and at this point the case is no

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2. While arguing the procedural posture of *Wilmer*, plaintiff confuses the terms "final judgment" and "final decision" (albeit cited opinions have used the terms interchangeably making the distinction difficult to discern). A "final decision" rendered by the district court provides the appellate court with jurisdiction under 28 U.S.C. § 1291, but such a final decision does not prevent a direct attack on subject matter jurisdiction because the case is still pending. *See Depex Reina*, 897 F.2d at 464 ("[B]y remanding the case to the district court, we did not create a final judgment. Rather, under 28 U.S.C. § 1291, we reviewed and reversed the final decision of the district court and the issue of jurisdiction was still alive."). A "final judgment," by contrast, is the threshold point, at issue for purposes of this opinion, in which an attack on subject matter jurisdiction becomes collateral and thus impermissible for erroneous judgments. *See id. See generally, Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155, 159 (7th Cir. 1995) (discussing different meanings of "finality"). Plaintiff's cited authority, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), (Doc. 150 at 4), discusses "final decisions" for purposes of 28 U.S.C. § 1291 and is therefore not on point.

longer pending.[3] "The denial of certiorari is a red herring. It marks the end of the appellate process and so, if the judgment from which certiorari was sought were itself a final judgment . . . it establishes finality in a strong sense." *Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155 (7th Cir. 1995).

Plaintiff argues that because the Rule 60(b)(4) motion was filed in the same district court under the same case number as the judgment being attacked, the effect of the denial of the writ of certiorari is somehow vitiated and the case magically becomes pending once again. The court disagrees that the case number under which a plaintiff chooses to file his Rule 60 (b) (4) motion determines the character of the attack. Rather, the timing of the motion in relation to the direct appeal of the case is the determinative factor. It is this timing which distinguishes *Wilber, Depex Reina,* and *Ramey,* from the instant case and *SBKC Service Corp. v. 1111 Prospect Partners, L.P.,* No. 95-2540-JWL, 1998 WL 928408 (D. Kan., Oct. 30, 1998). In both this case and in *SBKC,* the appellate process had been exhausted before the plaintiff moved the district court to void the judgment. *See SBKC,* 1998 WL 928408, at *1. A Rule 60(b)(4) motion is not to be used as a substitute for the appellate process. *See Kocher v. Dow Chemical Co.,* 132 F.3d 1225, 1229 (8th Cir. 1997). It follows that a Rule 60(b)(4) motion, therefore, cannot be used by plaintiff who did not succeed on her argument concerning subject matter jurisdiction during the appellate process.[4] Plaintiff should have

3. Indeed, because the case, after appeal, was never remanded to the district court, the court contemplates whether it even has jurisdiction at this point to consider whether it ever had jurisdiction at all. *See Lancaster v. Independent School District No. 5,* 149 F.3d 1228, 1237 (10th Cir. 1998) ("[F]iling notice of appeal generally divests the district court of jurisdiction over the issues on appeal . .") . See also *Gould v. Mutual Life Ins. Co. of New York,* 790 F.2d 769, 772 (9th Cir. 1986) (stating that district court does not have jurisdiction to consider Rule 60(b)(motion after appeal in the absence of remand).

4. The fact that plaintiff finally mentioned the possible lack of subject matter jurisdiction *after* the Tenth Circuit affirmed and on a motion for rehearing (which the Tenth Circuit denied without opinion), does not provide plaintiff with an exception to the doctrine of res judicata. *See Gould v. Mutual Life Ins. Co. of New York,* 790 F.2d 769, 771, 774-75 (9th Cir. 1986) (denying plaintiff's Rule 60(b)(4) motion after plaintiff first brought up lack of subject matter jurisdiction in motion for rehearing to appellate court).

argued the lack of diversity jurisdiction to this court before it dismissed her case. Plaintiff should have argued the lack of diversity jurisdiction in her original appeal to the Tenth Circuit or at oral argument. For whatever reason, both the Tenth Circuit, on plaintiff's motion for rehearing, and the United States Supreme Court, on plaintiff's petition for writ of certiorari, affirmed this court's dismissal of plaintiff's case without mentioning plaintiff's argument. In so doing, the Supreme Court rendered plaintiff's case final for purposes of res judicata. Her subsequent attack on this court's judgment is thus deemed collateral and will not be considered.

Simply put, plaintiff missed the chance to catch a ride on the appellate courts' boat to the land of reversal and remand. She cannot now run back to the dock and ask this court to row her across. The court might have been able to do so three years ago. Now the court's oars are mired in the doctrine of res judicata. The court's judgment stands.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion to vacate judgment pursuant to Fed. R. Civ. P. 60(b)(4) (Doc. 140) is DENIED.

IT IS SO ORDERED.

Dated this 4th day of October 1999, at Wichita, Kansas.

Monti Belot

Monti L. Belot
UNITED STATES DISTRICT JUDGE

STATUTES AND RULE INVOLVED

28 U.S.C. § 1332(a) provides in pertinent part as follows:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Rule 60. Relief from Judgment or Order

Rule 60(b)(4) provides in pertinent part as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

. . . .

(4) the judgment is void;

. . . .

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit

the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(2)

Supreme Court, U.S.
FILED
MAY 18 2001
OFFICE OF THE CLERK

No. 00-1447

In the Supreme Court of the United States

VIRGINIE GSCHWIND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT CESSNA AIRCRAFT COMPANY'S BRIEF IN OPPOSITION

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21-P

QUESTION PRESENTED

In 1993, petitioner's husband was killed when the airplane he was flying crashed in France. Petitioner sued respondents – The Cessna Aircraft Company, the manufacturer of the airplane, and Pratt & Whitney Canada, the manufacturer of the airplane's engine – in Ohio state court. Respondents removed the case to federal court and then moved to dismiss for *forum non conveniens*. Cessna also moved to transfer the case to the District of Kansas. After the case had been transferred to Kansas, the district court there dismissed for *forum non conveniens*. Petitioner appealed, and the Tenth Circuit affirmed. Petitioner filed a petition for writ of certiorari, which was denied.

Petitioner then returned to the District of Kansas, moving to vacate the district court's dismissal as void. The district court denied the motion. Petitioner appealed, and the Tenth Circuit affirmed.

The question presented here is:

Does Fed. R. Civ. P. 60(b)(4) require a federal court to permit collateral attack on a final judgment of dismissal for *forum non conveniens* brought by a party contending that complete diversity of citizenship was lacking in the prior proceeding?

PARTIES TO THE PROCEEDING

Respondents are The Cessna Aircraft Company and Pratt & Whitney Canada, Inc.

RULE 29.6 STATEMENT

The Cessna Aircraft Company is a wholly owned subsidiary of Textron Inc.

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In the Supreme Court of the United States

VIRGINIE GSCHWND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

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RESPONDENT CESSNA AIRCRAFT COMPANY'S BRIEF IN OPPOSITION

Respondent The Cessna Aircraft Company respectfully urges the Court to deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit's unanimous decision does not conflict with decisions of other circuits, is fully consistent with the decisions of this Court, and does not otherwise raise important constitutional or federal questions warranting this Court's review.

OPINIONS BELOW

The opinion of the Tenth Circuit for which petitioner seeks review (Pet. App. 1a-9a) is reported at 232 F.3d 1342.

The memorandum and order of the United States District Court for the District of Kansas denying petitioner's motion to vacate pursuant to Fed. R. Civ. P. 60(b)(4) is reported at 189 F.R.D. 643. (Pet. App. 10a-19a).

STATEMENT OF THE CASE

A. Background

This case arises from an airplane accident. On August 16, 1993, Cyril Gschwind was killed when the airplane he was flying crashed in southern France. Mr. Gschwind was a French citizen living in Belgium. Nearly two years after the accident, his widow, Petitioner Virginie Gschwind, who is a citizen of Belgium, filed a wrongful death suit in the Court of Common Pleas for Montgomery County, Ohio, against The Cessna Aircraft Company, Pratt & Whitney Canada, and Hartzell Propeller, Inc. Respondents removed the case to the United States District Court for the Southern District of Ohio. Petitioner moved to remand, arguing that although complete diversity of citizenship among other parties supported federal jurisdiction, Hartzell Propeller's presence as a resident Ohio corporation precluded removal under 28 U.S.C. § 1441(b). When Hartzell was later dismissed (the district court having ascertained that the airplane's propeller had been manufactured by Cessna, not Hartzell), the sole basis for petitioners' motion to remand disappeared, prompting the district court to deny it as moot. Petitioner did not seek interlocutory review of this decision. Pet. App. 10a-11a.

While the federal court in Ohio was assessing whether Hartzell was a proper party, Cessna moved to dismiss for *forum non conveniens* or to transfer to the District of Kansas pursuant to 28 U.S.C. § 1404(a). Pratt & Whitney Canada moved to dismiss for lack of personal jurisdiction or for *forum non conveniens*. The United States Magistrate Judge recommended denying the motions to dismiss, but granted Cessna's motion to transfer. Respondents lodged

timely objections to the Magistrate's recommendations on the motions to dismiss. Pet. App. 10a-11a.

After the transfer to Kansas, the district judge there accepted supplemental briefs on the *forum non conveniens* motions and several months later granted them. The case was not "conditionally dismissed," as petitioner suggests. Pet. App. 3a. The district court required that respondents agree to produce documents and witnesses for discovery in France, to waive any limitations defenses applicable there, and to transport physical evidence to France. To comply with these requirements, Cessna submitted an affidavit in which it agreed to absorb certain costs and waive certain defenses to assure that petitioner suffered no unfair prejudice from the dismissal. The district court also required that respondents agree to have the case reinstated in Kansas should the French courts refuse jurisdiction. It imposed these safeguards to secure an adequate alternative forum in France for petitioner, and failing that, to assure a forum for her here. Respondents agreed to comply with these conditions, and a judgment dismissing the case was entered shortly thereafter. *Id.* at 11a.

B. The First Appeal and First Petition for Certiorari

Petitioner appealed to the Tenth Circuit, challenging only the district court's rationale for dismissal under *forum non conveniens*. The statement of jurisdiction in her opening brief said that the court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the final judgment dismissing the case. It also stated that the district court's jurisdiction rested on 28 U.S.C. § 1332. Petitioner did not question the existence of diversity jurisdiction or subject-matter jurisdiction in her opening brief, her reply, or during oral argument. Not until after the Tenth Circuit had unanimously affirmed the district court's dismissal, *see Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998), did petitioner suggest (in a petition for rehearing) that the district court lacked subject-

matter jurisdiction. The Tenth Circuit panel denied the petition without comment. Pet. App. at 2a, 11a.

Petitioner then filed a petition for writ of certiorari, in which she again challenged subject-matter jurisdiction, claiming that because the parties were not completely diverse under the prevailing interpretation of 28 U.S.C. § 1332(a)(2), the district court lacked jurisdiction to dismiss her case for *forum non conveniens*. This Court denied certiorari. 526 U.S. 1112 (1999).

C. The Post-Judgment Motion to Vacate

On July 23, 1999, petitioner returned to Kansas, filing with the district court a motion to vacate the court's judgment of dismissal as void, pursuant to Fed. R. Civ. P. 60(b)(4). Petitioner argued that, because the district court lacked subject-matter jurisdiction when it dismissed for *forum non conveniens*, the prior final judgment was void and the case should be remanded to Ohio state court. Pet. App. 12a.

The district court denied the motion, applying the long-established rule that a litigant is barred by res judicata from making a collateral attack on a final judgment, even when the attack challenges the court's subject-matter jurisdiction. *Id.* at 16a. It noted that its judgment of dismissal was undisturbed by the Tenth Circuit or by this Court and was, therefore, final and not subject to further appeal. *Id.* Because petitioner's motion to vacate was lodged after a final affirmed judgment, rather than after remand or other disposition by the court of appeals, the district court rejected as distinguishable the cases petitioner cited. *Id.* at 17a. Unlike those cases, in which the motions to vacate were direct attacks in non-final ongoing cases, the district court found that petitioner's motion amounted to a collateral attack. *Id.* And while recognizing the inherent tension between procedural safeguards against the erroneous exercise of federal jurisdiction and the need for finality, the district court found finality the more compelling goal. *Id.* at 13a.

The district court held that Fed. R. Civ. P. 60(b)(4) is to be narrowly construed, and, in evaluating the circumstances that might warrant relief, made the important distinction between merely erroneous judgments, which do not warrant relief, and void judgments, which do. Pet. App. 12a. Without deciding whether it had erred in exercising subject-matter jurisdiction, the district court said that had it erred, the error would not have justified granting post-judgment collateral relief.

D. The Second Appeal

Petitioner again appealed to the Tenth Circuit, arguing this time that any action taken by a district court without subject-matter jurisdiction is void *ab initio* and subject to relief under Rule 60(b)(4). This was unanimously rejected. In its decision, the Tenth Circuit observed that a judgment is void for lack of subject-matter jurisdiction only when the entry of judgment is a plain usurpation of judicial power. *Id.* at 5a. Citing this Court's ruling in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), the panel noted that a federal court always has inherent authority to decide whether it has jurisdiction. Pet. App. 6a. The process of exercising that authority, the panel explained, may require the federal court to interpret a statutory grant of jurisdiction. But an error in interpretation does not render void the decision to exercise jurisdiction. Nor does it automatically void all decisions rendered while exercising jurisdiction based on that error. Pet. App. 5a-6a.

REASONS FOR DENYING THE PETITION

The decision below correctly applied the well-settled principles established in *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938). It does not conflict with decisions of other courts of appeals, and does not present any issue that warrants further review by this Court. Petitioner's principal argument—that the Tenth Circuit's interpretation of 28 U.S.C. § 1332(a) con-

flicts with other circuits—is based on a misreading of the Tenth Circuit's decision.

The various conflicts suggested in the petition are in truth not conflicts at all. They are instead products of petitioner's misstatements of, and exaggerations about, the Tenth Circuit's decision and the holdings of other cases. The decision below was a straightforward interpretation of the inherent authority vested in federal courts to decide on a case-by-case basis whether they have subject-matter jurisdiction. It does not warrant this Court's certiorari jurisdiction and does not present any important new issues under Fed. R. Civ. P. 60(b)(4). The petition should be denied.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE PREVAILING INTERPRETATION OF COMPLETE DIVERSITY UNDER 28 U.S.C. § 1332(a)(2)

Petitioner argues that the Court's review is warranted because the Tenth Circuit's interpretation of 28 U.S.C. § 1332(a)(2) was influenced by a Seventh Circuit case, *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993), which, according to petitioner, is in conflict with decisions of the Second, Fifth, Ninth, and District of Columbia Circuits. Petitioner misinterprets both *Allendale* and the Tenth Circuit's decision.

Allendale arose from a complicated, multi-party insurance coverage dispute involving foreign and domestic parties. On appeal from the district court's preliminary injunction, the Seventh Circuit considered whether the district court had subject-matter jurisdiction. *Id.* at 427. Finding citizens of states with diverse citizenship on both sides of the case, the Seventh Circuit found that the district court had subject-matter jurisdiction, but under 28 U.S.C. § 1332(a)(3), rather than § 1332(a)(2). In passing, the court commented briefly on the logic of how other circuits have interpreted §

1332(a)(2), but these comments had absolutely no bearing on the Seventh Circuit's analysis of the jurisdiction issue before it:

> The cases in which the statement [that United States citizens must be on both sides of an action between foreign citizens before a federal court may exercise diversity jurisdiction] appears are ones in which one side of the litigation had *only* foreign parties and the other had a mixture of foreign and domestic parties, so that the case did not fit any of the possibly applicable jurisdictional pigeonholes . . . . Exactly what sense this all makes rather eludes us. But we need not worry about the matter here. A case such as this, in which citizens of states are on both sides of the litigation . . . and are completely diverse, fits section 1332(a)(3) to a t.

Allendale, 10 F.3d at 428 (emphasis in original).

Viewed in proper context, these comments were mere *obiter dictum* ("we need not worry about the matter here") and were entirely unnecessary for the Seventh Circuit's decision. They certainly do not create a conflict between the circuits.

The Tenth Circuit also pointed out that an interpretation of § 1332(a)(2) was unnecessary to dispose of the issue petitioner had raised. Both respondents had conceded that under the prevailing interpretation of § 1332(a)(2) advocated by petitioner, complete diversity did not exist. The Tenth Circuit, therefore, did not decide whether § 1332(a)(2) provided a basis for subject-matter jurisdiction under the facts before the district court. It instead proceeded to the next step of its analysis and decided whether, assuming the district court did not have jurisdiction over the prior, terminated proceeding, the judgment of dismissal for *forum non conveniens* was void:

> While the circuits that have considered the issue read § 1332(a)(2) to require United States citizens on both sides of an action between foreign citizens, we concur with Judge Posner's observation that this interpretation is far from apparent from the face of § 1332(a)(2). Nevertheless, the Defendants assume for the sake of argument that the requirements of § 1332(a)(2) were not satisfied because Ms. Gschwind was not joined by a United States citizen. We make this same assumption inasmuch as the district court's views of jurisdiction are not dispositive to our analysis.

Pet. App. 4a-5a.

Having assumed that the district court lacked jurisdiction, the Tenth Circuit then considered whether the district court's assumed error was "a clear usurpation of power" rendering the judgment void, or merely an erroneous interpretation of a statutory grant of jurisdiction, which is not void. *Cf. Stoll v. Gottlieb*, 305 U.S. at 171. On this point, the appeals court charted a boundary between "usurpation" and "erroneous interpretation" by relying on *Nemaizer v. Baker*, 793 F.2d 58, 65 (1986), in which the Second Circuit had held that there must be "no arguable basis on which [the court] could have rested a finding that it had jurisdiction" before a judgment can be considered void. Pet. App. 6a. Citing the specific language the Ohio federal court used to conclude that the citizenship of the parties *was* completely diverse (a conclusion petitioner had undoubtedly helped prompt by stating in her motion to remand that complete diversity existed), the Tenth Circuit observed that the Ohio federal court had made a reasoned analysis of its statutory grant of diversity jurisdiction and simply came to a conclusion now assumed to be incorrect. *Id.* Then, citing the dicta in *Allendale* as a well-articulated *argument* for jurisdiction under like circumstances, the court concluded that there was at least an arguable basis for the district court's exercise of jurisdiction.

Petitioner surely makes too much of this, because neither court below based its disposition on an interpretation of the jurisdictional statute. Indeed, the Tenth Circuit expressly analyzed petitioner's collateral post-judgment motion to vacate on the premise that jurisdiction was lacking in the underlying case. In setting forth that premise, the Tenth Circuit *relied on* the prevailing interpretation of § 1332(a)(2) announced by the Second, Fifth, Ninth, and District of Columbia Circuits. Contrary to petitioner's contention, the Tenth Circuit did not reject that interpretation and did not create a circuit conflict.

II. THE TENTH CIRCUIT'S DECISION DID NOT RESULT FROM THE COURT EXERCISING HYPOTHETICAL JURISDICTION AND IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *STEEL CO.*

Petitioner next suggests that the Tenth Circuit exercised hypothetical jurisdiction when it assumed that the district court lacked subject-matter jurisdiction over the case. She says this violates the Court's ruling in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Her argument, however, both misstates this Court's holding and misapplies it to the Tenth Circuit's decision.

As this Court recently explained, in *Steel Co.* "this Court adhered to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). *Steel Co.* rejected the developing doctrine of "hypothetical jurisdiction" that allowed federal courts to defer ruling on challenges to jurisdiction "where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Steel Co.*, 523 U.S. at 93. The Court held that the requirement that jurisdiction be established as a threshold matter continues to be "inflexible and without exception." *Id.* at 94-95.

Nothing in the Tenth Circuit's decision is contrary to these holdings, nor did the Tenth Circuit extend "hypothetical jurisdiction," as that term has been defined in *Steel Co.* and *Ruhrgas*, to conduct its analysis. Unlike a court assuming subject-matter jurisdiction to get to the merits of a case without first deciding whether jurisdiction exists, here the Tenth Circuit assumed that the district court *lacked* subject-matter jurisdiction. And it did so not to decide the merits, but rather to decide whether the district court had an arguable basis for its alleged error in exercising jurisdiction—an error, it should be emphasized, that yielded a decision *not to exercise jurisdiction*.

Petitioner also argues that *Steel Co.* does not permit the Tenth Circuit to "hypothesize jurisdiction for purposes of determining whether the exercise of jurisdiction was void or voidable." Pet. 8. But she does not identify where in *Steel Co.* the Court extended its holding to her "void versus voidable" dichotomy. Nor does she explain how *Steel Co.* extends by analogy to such circumstances. Certainly petitioner cannot be heard to suggest that the Tenth Circuit's jurisdiction to hear her appeal was impermissibly "hypothetical," after she sought the district court's jurisdiction to consider her motion to vacate; after she invoked the Tenth Circuit's jurisdiction under § 1291 to review the district court's order denying her motion; and after she petitioned this Court to exercise its certiorari jurisdiction. Pet. 1.

III. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH OTHER APPELLATE DECISIONS CONCERNING CONDITIONS ON *FORUM NON CONVENIENS* DISMISSALS

Finally, there is no merit to petitioner's contention that the Tenth Circuit's decision creates an inter-circuit conflict with *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998). To develop this argument, petitioner first posits that by denying her motion to vacate, the district court necessarily decided that it had not overstepped its judicial authority by im-

posing conditions on its dismissal for *forum non conveniens*. She then suggests that by affirming the district court's decision to deny the motion to vacate, the Tenth Circuit also affirmed and approved of the conditions imposed. Based on these highly uncertain premises, she cites a footnote in *In re Papandreou* in which the District of Columbia Circuit cautioned against imposing conditions on *forum non conveniens* dismissals. She concludes from all this that the Tenth Circuit's decision creates a conflict with *In re Papandreou* warranting the Court's review.

The flaws in petitioner's argument are obvious. First, when the district court found, in considering Petitioner's motion to vacate, that its judgment of dismissal was not a "clear usurpation of power," it did not differentiate between its power to order a dismissal for *forum non conveniens* and its power to order such a dismissal with conditions. Pet. App. 15a. Without a specific holding from the district court about the jurisdictional validity of the conditions, there is no basis to discern or assume the extent to which they figured in the Tenth Circuit's analysis. The Tenth Circuit's observation on which petitioner props up her argument ("[t]he district court also concluded that its exercise of jurisdiction was not an usurpation of authority, presumably because the defendant's residence was subject to a bona fide dispute"), Pet. App. 4a, hardly suggests that the conditions played any role in the court of appeals' analysis. The district court's conditions are not mentioned in the Tenth Circuit's holding, nor are they identified as being a reason for, or a factor in, the holding. Pet. App. 6a-7a.

Petitioner fares little better developing the other side of the supposed inter-circuit conflict. *In re Papandreou* arose from an action brought by a foreign corporation and its sole shareholder against a Greek government minister and Greek governmental entities for breach of a license to operate a casino in Athens. 139 F.3d at 249. The defendants raised several defenses to the complaint, among them *forum non conveniens* and a jurisdictional bar under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. *See*

139 F.3d at 249. The plaintiff sought discovery aimed at testing the FSIA defense. *Id.* In response, the defendants sought a writ of mandamus to vacate a district court discovery order authorizing a deposition of the Greek minister. The thrust of the opinion, therefore, is the appropriateness of taking the depositions of cabinet-level governmental officials, not conditions imposed on *forum non conveniens* dismissals.

In re Papandreou briefly discussed *forum non conveniens* and includes the comment in footnote 6 quoted by petitioner. The District of Columbia Circuit did so, however, only as part of a larger effort to consider, at the defendants' urging, the alternative grounds for dismissal before evaluating the FSIA claim on which the discovery order was based. *Id.* at 254. The appeals court made plain that its discussion of *forum non conveniens* bore no impact on its decision to grant the writ of mandamus and vacate the discovery order:

> Of course we express no opinion on the merits of these alternative defenses, nor on whether determining them in advance of FSIA immunity would impose a lesser expected burden on the defendants in this case. Those matters are for the district court to determine in the first instance.

Id. at 256.

The District of Columbia Circuit's comments on *forum non conveniens* were unnecessary for its decision on the writ of mandamus. They are *obiter dictum* which, juxtaposed against the Tenth Circuit's silence on the conditions the district court attached to its judgment of dismissal, cannot reasonably be said to rise to the level of a conflict between the two circuits.

Two final thoughts bear considering. First, the imposition of conditions on the district court's dismissal was an issue that would have been more properly addressed the first time the case was appealed to the Tenth Circuit. The issue

bears more on whether the dismissal for *forum non conveniens* was correct than on the issue now before the Court – *i.e.*, whether the prior judgment is subject to collateral attack as void for lack of jurisdiction. Second, the conditions were imposed against the respondents to assure that petitioner had an adequate alternative forum in France in which to pursue her claims. The conditions did not prejudice her in any way. Her present argument – that conditions crafted by the district court to protect her interests create a conflict between the circuits – undercut the credibility of her entire petition.

IV. THIS CASE DOES NOT WARRANT FURTHER REVIEW BY COURTS IN THE UNITED STATES

The petition offers no practical reason for the Court to grant certiorari, nor does one suggest itself from considering the protracted history of this case. Three different federal courts have devoted nearly six years to deciding *where* it should be litigated. The Court should not require that it be remanded now, wasting years of judicial effort, and imposing unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836-37 (1989).

These considerations apply with particular force here because granting certiorari would have little or no effect on the ultimate outcome on where the case will be litigated. Were certiorari granted and the Tenth Circuit's decision reversed or vacated, the case would return to the Court of Common Pleas in Ohio. There, the respondents would renew their motion to dismiss for *forum non conveniens*. Under established Ohio law, the result would be the same as currently exists in federal court. The Ohio Supreme Court has recognized the doctrine of *forum non conveniens*, adopting the legal principles and standards established here in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Chambers v. Merrell-Dow Pharms., Inc.*, 519 N.E.2d 370 (Ohio 1988). Its statement of the purpose of *forum non conveniens* and the

standards applicable to considering motions based on it, are entirely consistent with this Court's decisions. *Id.* at 373.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

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BRIEF IN OPPOSITION FOR RESPONDENT PRATT & WHITNEY CANADA INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the language of 28 U.S.C. § 1332(a)(2) so plainly prohibits the exercise of a federal court's diversity jurisdiction over a case brought by a foreign plaintiff against a domestic defendant and a foreign defendant that a contrary interpretation of the statute rendered by a district court constitutes a clear usurpation of its power?

2. When a party unsuccessfully exhausts all challenges to a district court's subject matter jurisdiction on direct appeal, does the doctrine of *res judicata* bar a subsequent collateral attack of the final judgment by that party on the same ground, even if the court erroneously exercised jurisdiction in the first instance?

STATEMENT PURSUANT TO RULE 29.6

The parent company for Respondent Pratt & Whitney Canada Inc., United Technologies Corporation, is the only publicly held company owning ten percent (10%) or more of Pratt & Whitney Canada Inc.'s stock.

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STATEMENT OF THE CASE

On August 16, 1993, Cyril Gschwind, a French citizen living in Belgium, died when the Cessna Caravan 208B aircraft he was piloting crashed near Cannes, France. His spouse filed a wrongful death action asserting products liability claims against The Cessna Aircraft Company ("Cessna"), a Kansas corporation that manufactured the aircraft, Pratt & Whitney Canada Inc. ("Pratt & Whitney"), a Canadian corporation that manufactured the engine used in the aircraft, and Hartzell Propeller Inc. ("Hartzell"), an Ohio corporation that manufactured some (but not all) of the propellers used on Cessna aircraft.

The defendants removed the case to the United States District Court for the Southern District of Ohio based on the argument that Hartzell, a resident of the forum State, was fraudulently joined to destroy diversity. Plaintiff's motion to remand to state court was ultimately denied after Hartzell was dismissed as a party.

Defendant Cessna then filed a motion to dismiss on the grounds of *forum non conveniens* or, in the alternative, sought a change of venue to the United States District Court for the District of Kansas. Pratt & Whitney followed with a motion to dismiss for lack of personal jurisdiction or, in the alternative, for dismissal based on *forum non conveniens*.

The Southern District of Ohio granted the alternative request of transfer to the United States District Court for the District of Kansas. Following transfer, the District of Kansas reviewed defendants' motions to dismiss based on *forum non conveniens* and ultimately dismissed the case on May 8, 1997.

Plaintiff appealed the district court's *forum non conveniens* dismissal to the United States Court of Appeals for the Tenth Circuit. On September 18, 1998, the Tenth Circuit affirmed the district court's dismissal on *forum non conveniens* grounds. *See Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998).

Plaintiff then filed a petition for rehearing in the Tenth Circuit, in which she argued for the first time that the district court lacked subject matter jurisdiction over the case and requested that the Tenth Circuit's opinion affirming the district court's judgment be side aside for want of subject matter jurisdiction. On November 10, 1998, the Tenth Circuit issued, without opinion, an order denying plaintiff's petition for rehearing.

Upon the Tenth Circuit's denial of her petition for rehearing, plaintiff then filed a petition for a writ of certiorari with this Court. In her petition before this Court, plaintiff contended the United States District Court for the District of Kansas lacked subject matter jurisdiction under 28 U.S.C. § 1332. On May 17, 1999, this Court denied plaintiff's petition. *See Gschwind v. Cessna Aircraft Co.*, 526 U.S. 1112, 119 S. Ct. 1755, 143 L. Ed. 2d 787 (1999).

After this Court denied certiorari, plaintiff filed with the district court a motion to vacate judgment pursuant to FED. R. CIV. P. 60(b)(4), which provides, in pertinent part:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void [.].

In the motion, plaintiff contended the district court's lack of subject matter jurisdiction over the action essentially rendered it powerless to dismiss it. Accordingly, argued plaintiff, the district court's judgment was void and should be vacated.

On October 4, 1999, the district court denied plaintiff's motion to vacate judgment pursuant to FED. R. CIV. P. 60(b)(4). (Pet., App. at 10a-19a). *See also Gschwind v. Cessna Aircraft Co.*, 189 F.R.D. 643 (D. Kan. 1999). In so holding, the district court found that a judgment is rendered void (and subject to collateral attack) only when the court has clearly usurped its power. (Pet., App. at 15a). The district court further held that even if it lacked subject matter jurisdiction, its exercise of jurisdiction in the case was based on an erroneous interpretation of 28 U.S.C. § 1332 and did not constitute a clear usurpation of constitutionally granted authority. (Pet., App. at 15a). Therefore, "once the United States Supreme Court denied plaintiff's writ of certiorari, the issue of subject matter jurisdiction became res judicata and cannot be collaterally attacked." (Pet., App. at 12a).

Plaintiff once again appealed the district court's order to the Tenth Circuit, which affirmed the district court's holding. (Pet., App. at 1a-9a). *See also Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342 (10th Cir. 2000). The Tenth Circuit held that the district court's judgment was not void for lack of subject matter jurisdiction. (Pet., App. at 6a). The Tenth Circuit found that even though the district court may have erroneously interpreted 28 U.S.C. § 1332, its interpretation of the jurisdictional statute did not constitute a clear usurpation of power voiding its judgment "because the scope of the district court's jurisdiction over a case with foreign parties on both sides of an action is far from clear

from the face of the statute." (Pet., App. at 5a-6a). In light of its holding, the Tenth Circuit deemed it unnecessary to address the issue of whether the doctrine of *res judicata* barred plaintiff's challenge of subject matter jurisdiction. (Pet., App. at 9a).

REASONS FOR DENYING THE WRIT

In her petition for a writ of certiorari, Ms. Gschwind ("Petitioner") seeks this Court's review of the Tenth Circuit's holding that affirmed the district court's denial of Petitioner's motion to vacate judgment pursuant to FED. R. CIV. P. 60(b)(4).

Petitioner presents two questions for this Court's consideration. The first question — Does 28 U.S.C. § 1332(a)(2) require a citizen of the United States on both sides of an action between foreign citizens? — did not control the decision of either the district court or the Tenth Circuit, and it certainly need not be addressed by this Court. Instead, the question germane to this proceeding, and which dovetails into Petitioner's second question for review, is whether the district court's interpretation of 28 U.S.C. § 1332(a)(2) and subsequent dismissal of the action on *forum non conveniens* grounds was tantamount to a "clear usurpation of power" necessary to void its judgment pursuant to FED. R. CIV. P. 60(b)(4). As explained below, the lower courts' analysis and application of 28 U.S.C. § 1332(a)(2), while arguably erroneous, did not amount to a clear usurpation of their authority.

Petitioner has already challenged the subject matter jurisdiction of the district court and Tenth Circuit in the direct appeal of the district court's dismissal of her suit on *forum*

non conveniens grounds. In fact, this Court denied the petition for a writ of certiorari filed by Petitioner in February 1999 that challenged subject matter jurisdiction. *See Gschwind v. Cessna Aircraft Co.*, 526 U.S. 1112, 119 S. Ct. 1755, 143 L. Ed. 2d 787 (1999). Therefore, this subsequent, collateral attack on subject matter jurisdiction brought by Petitioner is barred by the doctrine of *res judicata*.

For these reasons, which are expounded upon below, it is unnecessary for this Court to review the well-reasoned decisions of the Tenth Circuit Court of Appeals and the United States District Court for the District of Kansas.

I.

EVEN ASSUMING THE DISTRICT COURT AND TENTH CIRCUIT LACKED SUBJECT MATTER JURISDICTION OVER PETITIONER'S CAUSE OF ACTION, THE COURTS' EXERCISE OF JURISDICTION PURSUANT TO 28 U.S.C. § 1332(a)(2) DID NOT AMOUNT TO A CLEAR USURPATION OF AUTHORITY.

In the underlying cause of action, Petitioner, a Belgian citizen, filed suit against a United States corporation and a Canadian corporation. Therefore, the suit presented the following party alignment: "Alien vs. Citizen and Alien."

The federal statute governing diversity jurisdiction, 28 U.S.C. § 1332, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

It is Petitioner's contention that the district court and Tenth Circuit lacked subject matter jurisdiction over the suit because the diversity statute does not contemplate the alignment of parties presented in this case. Petitioner argues that the district court's order dismissing the case on *forum non conveniens* grounds should be vacated because, pursuant to FED. R. CIV. P. 60(b)(4), the district court's judgment was void due to a lack of subject matter jurisdiction.

However, a judgment is void for lack of subject matter jurisdiction and open to collateral attack under FED. R. CIV. P. 60(b)(4) only when there is "a clear usurpation of power by a district court, and not an error of law in

determining whether it has jurisdiction." *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986); *see also Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980). In order to rise to the level of a "clear usurpation of power" necessary to void a judgment, "a court wrongfully extends its jurisdiction beyond the scope of its authority," *Kansas City Southern Ry. Co.*, 624 F.2d at 825, and there must be "no arguable basis on which [the court] could have rested a finding that it had jurisdiction." *Nemaizer*, 793 F.2d at 65.

The arguable basis for jurisdiction here rests in 28 U.S.C. § 1332(a)(2) (civil actions between "citizens of a State and citizens or subjects of a foreign state"). While Petitioner argues, and circuits squarely addressing the issue tend to agree, that 28 U.S.C. § 1332(a)(2) requires United States citizens on both sides of an action between foreign citizens, such an interpretation is not at all apparent from the face of the statute. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428 (7th Cir. 1993) (Posner, J.) ("Exactly what sense all this makes rather eludes us."). A leading treatise on issues of federal procedure also recognizes the ambiguity in the diversity statute:

> A further question arises in cases in which there are aliens on both sides of the dispute but a citizen (or citizens) on only one. Section 1332(a)(2) makes the combination of "Citizen vs. Alien" acceptable and Section 1332(a)(3) ostensibly confers jurisdiction to "Citizen and Alien vs. Citizen and Alien." **Yet "Citizen and Alien vs. Alien" remains unaddressed by the statute**, other than by analogy to the case law that has disallowed jurisdiction when there are aliens

> on both sides of the dispute, the continued vitality of which is questionable under a literal reading of Section 1332(a)(3).

14A Wright & Miller, *Federal Practice & Procedure* § 3661 (1998) (emphasis added).

In a case such as this, where one side of the litigation is comprised only of a foreign party and the other has a combination of foreign and domestic parties, it "[does] not fit any of the possibly applicable jurisdictional pigeonholes." *Allendale Mut. Ins. Co.*, 10 F.3d at 428. Therefore, it requires a court to delve into the history and meaning of the statute in order to interpret it. Even if that court's statutory interpretation is deemed erroneous upon collateral attack of the court's judgment, an erroneous exercise of subject matter jurisdiction does not constitute a clear usurpation of power warranting the voiding of that judgment. *See Kansas City Southern Ry. Co.*, 624 F.2d at 825.

"Since federal courts have 'jurisdiction to determine jurisdiction,' that is, 'power to interpret the language of the jurisdictional instrument and its application to an issue before the court,' error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction." *Kansas City Southern Ry. Co.*, 624 F.2d at 825 (quoting *Stoll v. Gottlieb*, 305 U.S. 165, 171, 59 S. Ct. 134, 137, 83 L. Ed. 104 (1938)). Here, because the scope of the court's jurisdiction posed by the "Alien vs. Citizen and Alien" scenario is far from clear from the face of the statute, there is an arguable basis for jurisdiction. *Nemaizer*, 793 F.2d at 65. Therefore, the courts' exercise of jurisdiction did not constitute a "clear usurpation of power," which is necessary to void the district court's judgment on collateral attack under FED. R. CIV. P. 60(b)(4).

II.

WHEN A PARTY UNSUCCESSFULLY CHALLENGES A DISTRICT COURT'S SUBJECT MATTER JURISDICTION ON DIRECT APPEAL, THE DOCTRINE OF *RES JUDICATA* BARS THE PARTY'S SUBSEQUENT, COLLATERAL ATTACK OF THE DISTRICT COURT'S FINAL JUDGMENT, EVEN IF THAT JUDGMENT IS BASED ON AN ERRONEOUS EXERCISE OF JURISDICTION.

Petitioner's wrongful death action was dismissed by the district court on *forum non conveniens* grounds on May 8, 1997. The Tenth Circuit affirmed the district court's order on September 18, 1998. Petitioner then filed a petition for rehearing with the Tenth Circuit, at which time Petitioner argued for the first time that the district court lacked subject matter jurisdiction. The Tenth Circuit denied Petitioner's petition for rehearing without comment. Petitioner then presented the jurisdictional argument to this Court in her petition for a writ of certiorari, which was denied on May 17, 1999.

The district court's May 8, 1997 judgment dismissing Petitioner's cause of action was a final, appealable judgment. *See Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U.S. 947, 70 S. Ct. 484, 94 L. Ed. 584 (1950) (holding that the dismissal of a claim on *forum non conveniens* grounds "puts an end to the action and hence is final and appealable"). Petitioner exhausted her direct appeals of the district court's final judgment when this Court denied her petition for a writ of certiorari on May 17, 1999. *Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155, 158 (7th Cir. 1995) ("[t]he denial of

certiorari . . . marks the end of the appellate process and so, if the judgment from which certiorari was sought were itself a final judgment . . . it establishes finality in a strong sense."). Using FED. R. CIV. P. 60(b)(4), Petitioner now seeks to collaterally attack the final judgment dismissing her claims on *forum non conveniens* grounds. This collateral attack on the prior judgment is barred by the doctrine of *res judicata*.

"[A] federal court's erroneous exercise of subject matter jurisdiction is not subject to collateral attack." *Nemaizer*, 793 F.2d at 65 (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940)). "The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage Dist.*, 308 U.S. at 377, 60 S. Ct. at 320. "Even if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties *could* have challenged the court's power to hear a case, then *res judicata* principles serve to bar them from later challenging it collaterally." *Nemaizer*, 793 F.2d at 65 (citing *Chicot County Drainage Dist.*, 308 U.S. at 378, 60 S. Ct. at 320)).

These principles have been reaffirmed by this Court on several occasions. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9, 102 S. Ct. 2099, 2104 n.9, 72 L. Ed. 2d 492 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations — both subject matter and

personal."); *see also Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2427, 69 L. Ed. 2d 103 (1981).

In an attempt to distinguish these well-reasoned decisions, Petitioner may identify case law suggesting that a court's subject matter jurisdiction can be collaterally attacked pursuant to FED. R. CIV. P. 60(b)(4). However, these cases "always involve a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction." *Nemaizer*, 793 F.2d at 65 (citing *Kansas City Southern Ry. Co.*, 624 F.2d at 825). " 'A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].' " *Federated Dept. Stores, Inc.*, 452 U.S. at 398, 101 S. Ct. at 2428 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S. Ct. 600, 604, 71 L. Ed. 1069 (1927)).

Because the lower courts' exercise of jurisdiction did not rise to the level of a "clear usurpation of power," as explained in Section I *supra*, the doctrine of *res judicata* bars Petitioner's collateral attack on subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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